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IN THE

Supreme Court of the United States

CHARLES F. CHAMPION,
Appellant.

vs.

JOHN C. AMES, United States Marshal,
Appellee.

Number 106

Appeal from the Circuit Court of the United States
For the Northern District of Illinois.

BRIEF OF APPELLANT.

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IN THE

Supreme Court of the United States

CHARLES F. CHAMPION,
Appellant.

vs.

JOHN C. AMES, United States Marshal,
Appellee.

Number 860.

Appeal from the Circuit Court of the United States For the Northern District of Illinois.

BRIEF OF APPELLANT.

STATEMENT OF CASE.

On May 9, 1899, a complaint was made by G. H. Voss, before Lewis F. Mason, a United States Commissioner, at Chicago, charging appellant, C. F. Champion, W. F. Champion and Charles B. Park with conspiring to commit an offense against the United States, to-wit: For the purpose of disposing of the same, to cause to be carried from Dallas, Texas, to Fresno, California, certain papers, certificates and instruments, purporting to be, and representing tickets, chances, shares and interests in, and depending on the event of a lottery thereafter to take place, and offering prizes dependent on lot or chance; that said papers, certificates and tickets were deposited with, and carried by the Wells, Fargo

Express Company, a corporation engaged in carrying freight and packages over railways from Dallas, Texas, to Fresno, California, for hire. (Rec., 8-13.) Attached to and made a part of said complaint, are—

First. The indictment of the Grand Jury for the Northern District of Texas, being an indictment charging C. F. Champion, W. F. Champion and C. B. Park with substantially what they are charged in the body of the complaint. (Rec., 14.)

Second. The record of the case of *United States of America, appellant,* v. *C. F. Champion, appellee,* filed in the Circuit Court of Appeals of the Seventh Circuit. (Rec., 34 to 110.)

On the hearing of the said complaint, appellant, C. F. Champion, who was the only defendant arrested at Chicago, was ordered by said United States Commissioner to enter into a recognizance in the sum of $1,000 for trial before the United States District Court of Texas, at the next January term; in default of bail he was remanded to the custody of the Marshal. (Rec., 7.)

Thereupon he sued out a writ of habeas corpus before Judge Kohlsaat of the District Court, and said writ was made returnable before Judge Jenkins of the Circuit Court. (Rec., 1 to 7.)

The United States Marshal returned said writ, simply reciting that he had the petitioner in custody June 22, 1899, by virtue of the commitment of United States Commissioner Mason, and that the petitioner was subsequently (that is, between the issuance of the writ and the date of the Marshal's return) bailed by order of court. (Rec., 111.)

On the hearing of said petition by Judge Jenkins, it was adjudged that the writ be discharged and the petitioner remanded to the custody of the Marshal.

Champion thereupon perfected his appeal to this court.

In the court below both counsel for petitioner and for the Government argued the sufficiency of the evidence before the Commissioner, and the court in its opinion also passed upon the weight of the testimony. Since making up the record, however, a more careful investigation of the authorities has convinced us that the sufficiency of the evidence was a question for the Commissioner, and one which the court could not properly go into on *habeas corpus,* and hence this court, in its consideration of the case, can eliminate from the record all of the testimony and accompanying exhibits, and confine itself solely to the constitutional question raised by the petition.

The second and third paragraphs of the petition are as follows:

"*Second.* The offense which it is alleged in said indict-
"ment your petitioner and said other accused persons con-
"spired to commit, to-wit, the violation of section 1 of the
"act of Congress passed March 2d, 1895,—2 Supp. Revised
"Statutes United States, page 435,—is not such an offence
"as the Congress of the United States had the right to
"create, and that Congress exceeded its power in passing
"the said statute, in that such power was not conferred upon
"Congress by the Constitution of the United States, and such
"statute is null and void.

"*Third.* The statute last above mentioned, which created
"the offence which it is charged by said indictment and said
"complaint last filed before said Commissioner Mason, your
"petitioner, and said other accused persons, conspired to
"violate, is unconstitutional and void and contrary to the
"first amendment to the Constitution of the United States,
"in that the same abridges the freedom of the press." (Rec., 5.)

That the constitutional questions were fairly raised and argued, appears from the certificate of Judge Jenkins. (Rec., 122):

"I, James G. Jenkins, one of the judges of the Circuit "Court of the United States for the Seventh Judicial Cir- "cuit, do hereby certify that upon the hearing of the above "cause the construction and application of the first amend- "ment to the Constitution of the United States was fairly "raised by the petition of said petitioner for a writ of *habeas* "*corpus*, and was argued upon the hearing of the same, and "was by me determined.

"And I do further certify that the application of clause "3 of section 8 of article 1 of the Constitution of the United "States was fairly raised by the petition of said petitioner "for a writ of *habeas corpus*, and was argued upon the hear- "ing of the same and was by me determined.

"And that the power of the Congress of the United States "to pass section 1 of the act of March 2, 1895, 2 Supp. R. "S. U. S., 435, was fairly raised by the petition of said peti- "tioner for a writ of *habeas corpus*, and was argued upon "the hearing of the same, and was by me determined.

"And that the constitutionality of section 1 of the act of "March 2, 1895, 2 Supp. R. S. U. S., 435, was involved in "said above cause, and was argued by the respective counsel "upon the hearing of the same, and was by me determined."

The sole question, then for determination, is whether so much of Section 1 of the Lottery Act of March 2, 1895, as prohibits the sending of lottery matter and lottery advertisements from one state to another, by means other than the mails, is invalid because not authorized by, and in violation of the Constitution of the United States.

Assignment of Errors Relied Upon.

1. By the record aforesaid it appears that the judgment aforesaid was given for the respondent and against the petitioner, whereas, by the law of the land, said judgment ought to have been given for said petitioner, Charles F. Champion, and against the said respondent.

2. The court erred in entering an order and judgment discharging the writ of *habeas corpus* and remanding petitioner to the custody of the respondent.

3. The court erred in not entering an order discharging petitioner upon said writ of *habeas corpus*.

4. The court erred in not holding and finding that that portion of Sec. 1 of the Act of March 2, 1895, 2 Supp. R. S. U. S., 435, which makes it an offense to carry from one state to another in the United States any paper, certificate, or instrument purporting to be or represent a ticket, chance, share, or interest in or dependent upon the event of a lottery, so-called gift concert, or similar enterprise offering prizes dependent upon lot or chance, or shall cause any advertisement of such lottery, so-called gift concert, or similar enterprise offering prizes dependent upon lot or chance to be transferred from one state to another in the United States, is unconstitutional and void and in violation of the first amendment of the Constitution of the United States.

5. The court erred in not finding that the Congress of the United States was not empowered under and by virtue of paragraph 3 of Section 8 of Article 1 of the Constitution of the United States to pass and enact that portion of Section 1 of the Act of March 2, 1895, 2 Supp. R. S. U. S., 435, which makes it an offense to carry from one state to another in the United States, any paper, certificate, or instrument, purporting to be or represent a ticket, chance, share, or interest in or dependent upon the event of a lot-

tery, so-called gift concert, or similar enterprise offering prizes dependent upon lot or chance, or shall cause any advertisement of such lottery, so-called gift concert, or similar enterprise offering prizes dependent upon lot or chance to be transferred from one state to another in the United States.

6. The court erred in not finding and deciding that it was beyond the power of Congress to pass and enact that part of Section 1 of the Act of March 2, 1895, 2 Supp. R. S. U. S., 435, which makes it an offense to carry from one state to another in the United States any paper, certificate, or instrument purporting to be or represent a ticket, chance, share, or interest in or dependent upon the event of a lottery, so-called gift concert, or similar enterprise offering prizes dependent upon lot or chance, or shall cause any advertisement of such lottery, so-called gift concert, or similar enterprise offering prizes dependent upon lot or chance to be transferred from one state to another in the United States, and that that portion of said statute was unconstitutional, null, and void.

7. The court erred in holding that the commissioner, Lewis F. Mason, had jurisdiction of the subject-matter in the proceedings before him, said commissioner, as set forth in the record herein.

8. The court erred in finding that said petitioner should not be discharged upon said writ of *habeas corpus* for the reasons set forth in the petition of said petitioner, alleging that he was unlawfully restrained of his liberty by the respondent, John C. Ames, United States Marshal.

I.

That portion of Section 1 of the Lottery Act of March 2, 1895, which prohibits the transportation of lottery matter from one state to another, by means other than the mails, is unconstitutional and void.

Appellant contends that Section 1 is unconstitutional, first, because paragraph 3 of Section 8 of Article 1 of the Constitution, which gives Congress the power "to regulate "commerce with foreign nations and among the several "states and with the Indian tribes," is not broad enough to authorize Congress to make a law prohibiting the transmission of lottery tickets and advertisements from one state to another, by means other than the United States mails; and, second, because the act is contrary to the first amendment to the Constitution, which provides that "Congress "shall make no law abridging the freedom of * * * the "press."

FIRST. THE ACT IS UNCONSTITUTIONAL BECAUSE IT IS NOT A REGULATION OF FOREIGN OR INTERSTATE COMMERCE.

What is the legitimate end sought by the act? Is it to regulate commerce between the states, or is it to regulate the morals of the people of the states? If the former, it is constitutional; if the latter, it is unconstitutional. Hence, it almost necessarily follows that Congress has made the regulation of commerce its *apparent purpose*.

We insist that (A) an analysis of the act, and (B) the evolution of lottery legislation in the United States, demonstrates to a certainty that the *real* purpose of Congress in the passage of this act was to regulate the morals of the people and to control and destroy the lottery business.

A.

An uninterrupted line of authorities supports the proposition that the test of the validity of a statute is its *real* and not its *apparent* object, and that its real object must be ascertained by determining whether the legitimate end sought is within the scope of the legislative power.

In *Yick Wo* v. *Hopkins*, 118 U. S., 356, where this court had under consideration the validity of an order of the City and County of San Francisco, which made it unlawful for any person to engage in the laundry business within the corporate limits "without first having obtained the consent of "the board of supervisors, except the same be located in a "building constructed of brick or stone," it was held that though its *apparent* purpose was to enact a police regulation, yet its actual enforcement showed that its *real* purpose was to drive the Chinese out of the laundry business. Hence, it was declared unconstitutional.

Morgan R. R. Steamship Co. v. *Louisiana*, 118 U. S., 455:

The plaintiff sought to restrain the Louisiana board of health from collecting certain quarantine fees provided for by an act of the Louisiana legislature, on the ground that said act was unconstitutional, among other reasons, because it was in violation of the commerce clause of the Federal Constitution. In discussing the case Justice MILLER says (p. 462):

"In all cases of this kind it has been repeatedly held that "when the question is raised whether the state statute is a "just exercise of state power, or is intended, by roundabout "means, to invade the domain of federal authority, this

"court will look into the operation and effect of the statute "to discern its purpose."

In *United States* v. *Fox*, 95 U. S., 670, wherein was involved the validity of that provision of the Bankrupt Act which made it an offense to obtain goods on credit by false pretenses three months before the petition in bankruptcy was filed, the court say:

"There is no doubt of the competency of Congress to pro- "vide, by suitable penalties, for the enforcement of all legis- "lation necessary or proper to the execution of powers with "which it is entrusted. * * * Any act committed with a "view of evading the legislation of Congress passed in the "execution of any of its powers, or of fraudulently securing "the benefit of such legislation, may properly be made an "offense against the United States, but an act committed "within a state, whether for a good or a bad purpose, or "whether with an honest or criminal intent, cannot be made "an offense against the United States unless it have some re- "lation to the execution of a power of Congress, or to some "matter within the jurisdiction of the United States. An act "not having any such relation is one in respect of which the "state can alone legislate."

Minnesota v. *Barber*, 136 U. S., 313:

This court held the Meat Inspection Law of Minnesota void, because of interference with interstate commerce. Justice HARLAN says (p. 326):

"Although this statute is not avowedly, or in terms, di- "rected against the bringing into Minnesota of the products "of other states, its necessary effect is to burden or obstruct "commerce with other states."

And, again, after reviewing a great many authorities, he says:

"Upon the authority of those cases and others that could "be cited, it is our duty to inquire in respect to the statute "before us, not only whether there is a real or substantial "relation between its avowed objects and the means devised "for obtaining those objects, but whether, by its necessary "or natural operation, it impairs or destroys rights secured "by the Constitution of the United States."

Henderson v. *Wickham*, 92 U. S., 259:

The statute of the State of New York requiring owners of vessels to give certain bonds before landing passengers, or pay a fixed sum for each passenger landed in lieu of such bonds, was held void. Justice MILLER says (p. 268):

"In whatever language a statute may be framed, its pur- "pose must be determined by its natural and reasonable ef- "fect; and if it is apparent that the object of this statute, "as judged by that criterion, is to compel the owners of ves- "sels to pay a sum of money for every passenger brought by "them from a foreign shore and landed at the Port of New "York, it is as much a tax on passengers, if collected from "them, or a tax on the vessel or owners for the exercise of the "right of landing their passengers in that city, as was the "statute held void in the *Passenger* cases."

The cases of *City of New York* v. *Miln*, 11 Pet., 103, and *The Passenger Cases*, 7 How., 283, also clearly illustrate the proposition. Moreover, the principle is recognized by this court in connection with this very statute, in the case of *In re Rapier*, 143 U. S., 110-133.

Applying this method of interpretation to the act in question, can there be the slightest doubt as to what was the *real*

purpose of Congress? Does the title of the act, "An Act for the Suppression of Lottery Traffic through National and Interstate Commerce," etc., deceive? Is it not clear that it is a palpable attempt on the part of the National Legislature to usurp the functions of the State Legislature? Can the act be construed as a legitimate regulation of commerce? Is the transportation from one state to another of any tangible thing, commerce?

Counsel for the government must concede that unless the statute alleged to have been violated by appellant, was enacted by Congress by virtue of the authority of the Commerce Clause of the Constitution, the act is a nullity. We maintain that no such authority was conferred upon Congress by this provision of the Constitution; that commerce, within the meaning of the Federal Constitution, does not include traffic in lottery tickets or transportation of lottery advertisements, and that there is no property in a lottery ticket so as to make it a subject of commerce; that traffic in lottery tickets is gambling, pure and simple, and not a regulation of inter-state commerce, but a subject wholly under the control of the several states of the Union.

These contentions naturally lead us, first, to an inquiry as to the definition and construction of the word "commerce," within the meaning of the Commerce Clause of the Constitution. In the Century Dictionary, "commerce" is defined to be "interchange of goods, merchandise or property of "any kind; trade, traffic; used more especially of trade on a "large scale carried on by transportation of merchandise "between different countries, or between different parts of "the same country."

"Commerce" has been often defined by this court. One of the most comprehensive definitions ever given, is that of Mr. Justice FIELD, in *Welton* v. *Missouri*, 91 U. S., 275: "Commerce is a term of the largest "import. It comprehends intercourse for the purposes of

"trade in any and all its forms, including the transporta-
"tion, purchase, sale and exchange of commodities between
"the citizens of our country and the citizens or subjects of
"other countries, and between the citizens of different
"states."

One of the most frequently quoted definitions is that of Chief Justice MARSHALL, in *Gibbons* v. *Ogden*, 9 Wheaton, 1: "Commerce undoubtedly is traffic, but it is something
"more; it is intercourse. It describes the commercial inter-
"course between nations and parts of nations, in all its
"branches, and is regulated by prescribing rules for carry-
"ing on that intercourse."

It is clear, however, that commerce, as used in the Constitution, is restricted to commercial intercourse. Even Webster, in his great argument in *Gibbons* v. *Ogden, supra*, recognizes that the constitutional phrase has its limitations. "It should be repeated," he says, "that the words used in
"the Constitution, 'to regulate commerce,' are so very gen-
"eral and extensive that they might be construed to cover a
"vast field of legislation, part of which has always been
"occupied by state laws; and therefore, the words must have
"a reasonable construction, and the power should be con-
"sidered as exclusively vested in Congress, so far, and so
"far only, as the nature of the power requires." (Page 14.)

Again this court has said in the *Trade Mark* cases, 100 U. S., p. 95:

"Every specie of property which is the subject of com-
"merce, but which is used, or even essential in commerce,
"is not brought by this clause within the control of Con-
"gress. The barrels and casks, the bottles and boxes in which
"alone certain articles of commerce are kept for safety and
"by which their contents are transferred from the seller to

"the buyer, do not thereby become subjects of congressional "legislation more than other property."

These definitions might be multiplied by citing from many other cases, but we deem it unnecessary. We have seen that there is no broader definition of commerce in the books than, "commercial intercourse." Hence, after all, the simple proposition can be stated thus: Is the sending of lottery tickets and lottery advertisements via express by a citizen of Texas to a citizen of California, "commercial intercourse?"

The solution of this question depends primarily upon whether a lottery ticket or a lottery advertisement is an *article of commerce*. The test to be applied as to whether a thing is subject of commerce, should be, "Is it a com- "modity?" "Has it a market or intrinsic value?" "Is "there any right of property in it?" "Is it a thing prop- "erly the subject of barter and sale?" It certainly can not be seriously contended that there is any right of property in a lottery ticket, or that such ticket is anything more than what it purports to represent, namely, an instrument or certificate representing a chance in the happening of a future event, to be determined by lot, wherein money or property may be drawn; in other words that it is speculation or gambling, whereby, by the investment of a small sum of money, the holder of such ticket may possibly become possessed of a larger sum or lose his entire investment made in the purchase of such ticket. It is nothing more than a voucher or receipt given by a lottery company that it will pay to the holder of such voucher or receipt a certain sum of money provided that at some subsequent drawing the number upon the purchaser's ticket shall be drawn.

In other words, it is but the evidence of a contract between the lottery company and the purchaser of the ticket. It has no intrinsic value as an article of merchandise; it has no value in and of itself, except that it is the printed evidence of a contract. If the lottery company refuses to carry out such contract, the ticket is at once worthless. There is no market for its sale as such, and it has no market value. It is not a commodity or an article of merchandise that is handled in the marts of trade.

While this court did not agree with the Supreme Court of Tennessee in the case recently decided of *Austin* v. *State of Tennessee*, that cigarettes were not articles of commerce, yet neither the majority opinion nor the dissenting opinion of Justice Brewer condemns the argument of the Tennessee court to the effect that there *are* tangible objects that are not articles of commerce. The following language taken from the opinion, met with no dissent in this court:

"Only those things which are in fact commodities in some "true sense, and, as such, are proper things for importa- "tion and use, can be legitimate articles of commerce, and "within the scope of the constitutional provision invoked "by the defendant in this case. Regulation of traffic in "things not suited for commerce was not by that provision "delegated to Congress."

Austin v. *State*, 101 Tenn., 563.

Illustrative of the proposition that a lottery ticket is not an article of commerce:

(*a.*) A railroad ticket is not an article of commerce. A railroad ticket is not merchandise; it is only a receipt or voucher for the payment of the passenger's fare, and is but

evidence of the contract of carriage between the railroad company and the passenger.

Ray's Neg. of Pass., Carriers, 198, 199, 494, 495.
2 Beach on Railways, Sec. 869.
Commonwealth v. *Wilson*, 14 Phil., 384-393.

(*b.*) An insurance policy is not an article of commerce. In *Paul* v. *Virginia*, 8 Wallace, 168, Justice FIELD says (p. 183):

"Issuing a policy of insurance is not a transaction of commerce. The policies are simple contracts of indemnity "against loss by fire, entered into between the corporations "and the assured, for a consideration paid by the latter. "These contracts are not articles of commerce in any proper "meaning of the word. They are not subjects of trade and "barter offered in the market as something having an existence and value, independent of the parties to them. "They are not commodities to be shipped or forwarded from "one State to another, and then put up for sale."

In *Hooper* v. *California*, 155 U. S., 648, after having approvingly discussed the case of *Paul* v. *Virginia*, Justice WHITE says (p. 655):

"The business of insurance is not commerce. The contract of insurance is not an instrumentality of commerce. "The making of such contract is a mere incident of commercial intercourse, and in this respect there is no difference whatever between insurance against fire and insurance against 'the perils of the sea.'"

The same doctrine was adhered to with respect to a life insurance policy in

New York Life Ins. Co. v. *Cravens*, 178 U. S., 389, 401.

(*c.*) It has been held that the business of an interstate mercantile agency is not commerce. In a case involving the constitutionality of a law imposing certain taxes on mercantile agencies, where the law was attacked, among other reasons, for being an interference with interstate commerce, the Supreme Court of South Dakota, in an ably considered opinion, *State* v. *Morgan*, 2 S. D., 32, 53, held that the business of the R. G. Dun Mercantile Agency was not commerce. It was urged by the plaintiff in error (the agent of Dun's) that the agency was an instrument of commerce, but the court say:

"Information or intelligence is not an article of commerce, in any proper meaning of that word. Neither are "they subjects of trade and barter, offered in the market "as something having an existence and value independent of "the parties to them."

What is a lottery ticket but that which gives to its purchaser evidence or information that if a certain number that is stamped on the face of the ticket shall be selected at a subsequent drawing, he will be entitled to a certain sum of money? The ticket is of worth only if the number that it evidences is drawn. After the drawing, if that number draws no prize, the ticket has no value. Before the drawing and at the time of shipment, the ticket is worthless. If the numbers selected by those gambling in the result of the lottery could be tabulated by the lottery company without the aid of the tickets, the commercial aspect of the transaction, if any, would be the same as now.

(*d.*) A bill to foreclose a mortgage was filed in Alabama by a foreign corporation, and the Supreme Court, discussing the constitutional provision relative to foreign corporations and its relation to the Federal Commerce Clause, say:

"Money is not a commodity of barter and sale; or to be "put up and sold after being shipped. The loaning of money "by foreign corporations engaged in that business is not a "matter of interstate commerce."

Nelms v. *Edinburg-American Loan Mortgage Co.*, 92 Ala., 157-161.

In Prentice & Egan on the Commerce Clause of the Federal Constitution (p. 55), the authors say:

"The protection of the Constitution does not extend to "lotteries, games of chance or speculation. These may be "interstate gambling, but are not commerce. A state may "regulate or prohibit buying and selling what are commonly "known as 'futures'; may prohibit the sale of lottery tickets "or of bonds containing conditions which make their value "dependent upon chance. It may forbid the sale of pools "on horse races conducted without the State, although not "forbidden as to races conducted within the State, and may "forbid the sending of money without the State for gambling "purposes."

A great many cases are cited in the notes in support of the above.

The State of Illinois has had since 1847 a law making it a penal offense to operate a lottery or to sell, or have in one's possession with intent to sell, lottery tickets. Suppose that prior to the act of 1895 a citizen of New York, traveling by rail from New York to Chicago, had brought with him in his satchel a package of lottery tickets, with the intention of selling the package in Chicago. He is arrested by the State authorities, and charged with having in his possession a *package* of lottery tickets with the intention of selling the same in the State of Illinois. He interposes the defense that was made by Leisey in *Leisey* v. *Hardin*, 135 U. S., 100.

He contends that a package of lottery tickets, the same as a barrel of beer or a case of liquors, is a commercial commodity —an article of interstate commerce, and that the law of the State of Illinois denying him the right to bring within the State and sell such a package, is unconstitutional and void as being an unwarranted interference with interstate commerce. What would have been the judgment of this court? Would it have placed lottery matter in the same category with spirituous liquors, and have held that the lottery tickets were articles of interstate commerce?

Suppose, again, lotteries were legal in Illinois. Instead of selling lottery tickets, a number of persons were deputized to act as—let us say—lottery salesmen. A is authorized to sell *numbers* (not tickets) from 1 to 100; B from 100 to 200, etc. The drawing is held at Chicago. A goes to Indiana to sell his *numbers* from 1 to 100, and he succeeds in selling them to 100 different persons; the purchasers, however, receive nothing to evidence their purchases. A keeps a list of persons to whom he has sold numbers, showing the numbers sold to each person. He returns to Chicago, and this list guides the company in the distribution of its prizes. Has A been engaged in an act of interstate commerce?

Under this act, if a man living in Kansas City, Missouri, having his place of business in Kansas City, Kansas (the State line divides the city in two parts), should be reading a newspaper containing a lottery advertisement while riding in a street car from his home to his place of business, he would be guilty (not taking into consideration the element of the criminal intent). The language of the act is broad enough to include a newspaper so carried and to characterize it as an article of commerce.

B.

We insist that the evolution of Federal lottery legislation demonstrates that the purpose of Congress in passing the act of 1895 was not to regulate interstate commerce, but to destroy interstate lottery gambling. In an appendix to this brief, the court will find all of the lottery statutes enacted by Congress, beginning with the act of 1827, and ending with the act of 1895.

Until 1872 no penalty attached to sending lottery matter through the mails. Under that act, the fine was not less than $100, and not more than $500. This penalty, however, did not deter offenders, and in 1890 it was increased by adding the imprisonment clause, and for the first time the law prohibiting the sending of lottery matter through the mails became effective. Up to this time there was no pretense that the legislation was enacted for any other purpose than to keep the mails free from obnoxious matter; no pretense that there was an effort to regulate lottery traffic through foreign and interstate commerce. But it was found that though debarred from using the mails, the express companies were still open to the lotteries. Congress discovered that the stringent law of 1890 was easily circumvented.

In the meantime all of the States where lotteries were theretofore legally conducted, had, by constitutional enactments, prohibited lotteries, and the anti-lottery sentiment had developed so rapidly that Congress, in order to finally destroy the alleged evil, found it necessary to pass the comprehensive act of March 2, 1895, and was of necessity forced to take the false position that it was "An Act for the sup-"pression of lottery traffic through national and interstate "commerce."

SECOND. THAT PORTION OF THE FIRST SECTION OF THE ACT WHICH PROHIBITS THE TRANSPORTATION OF LOTTERY ADVERTISEMENTS BY MEANS OTHER THAN THE MAILS, IS UNCONSTITUTIONAL AND VOID, BECAUSE IT VIOLATES THE FIRST AMENDMENT TO THE CONSTITUTION IN ABRIDGING THE FREEDOM OF THE PRESS.

We insist that this act, in so far as it prohibits the transportation by any other method than through the mails, of lottery tickets and advertisements of a lottery, is contrary to the first amendment of the Constitution. We concede that under clause 7 of Section 8 of Article 1 of the Constitution, Congress has the power to exclude from the mails lottery tickets, advertisements of a lottery, etc., but that it can prohibit the transportation of such matter by an express company or by any other method we deny. Nor can it be contended that the power to prohibit the transmission of lottery matter is *incidental* to the power to regulate commerce, firstly, because the reasons already presented, demonstrate that lottery traffic is not commercial intercourse, and secondly, because of the direct inhibition of the first amendment.

We do not propose to enter into any extended discussion of this proposition, and shall content ourselves by calling the court's attention to the several authorities where the question has heretofore been considered.

We can well rest our claim that the act, as at present constituted, does abridge the freedom of the press, upon the decisions of this court in

Ex parte Jackson, 96 U. S., 727, and
In re Rapier, 143 U. S., 110.

In *ex parte Jackson, supra,* the question was whether Section 3894 of the Revised Statutes, which made it a penal offense to send letters or circulars concerning lotteries by mail, etc., was constitutional. Counsel for petitioners in the *Jackson* case, based their arguments largely on the views expressed by eminent statesmen during the congressional debates in 1836 relative to the exclusion of anti-slavery publications from the mails. Replying to this argument, Justice FIELD, in the opinion of the court, says (p. 735):

"Great reliance is placed by the petitioner upon these "views, coming, as they did in many instances, from men "alike distinguished as jurists and statesmen. But it is "evident that they were founded upon the assumption that "it was competent for Congress to prohibit the transporta- "tion of newspapers and pamphlets over postal routes in "any other way than by mail; and of course, it would fol- "low that if with such a prohibition, the transportation in "the mail could also be forbidden, the circulation of the "documents would be destroyed, and a fatal blow given to "the freedom of the press. But we do not think that Con- "gress possesses the power to prevent the transportation in "other ways, as merchandise, of matter which it excludes "from the mails. To give efficiency to its regulations and "prevent rival postal systems, it may, perhaps, prohibit the "carriage by others for hire, over postal routes, of articles "which legitimately constitute mail matter, in the sense in "which those terms were used when the Constitution was "adopted—consisting of letters and of newspapers and "pamphlets, when not sent as merchandise; but further "than this its power of prohibition can not extend."

And again on page 733:

"Nor can any regulations be enforced against the trans- "portation of printed matter in the mail, which is open to

"examination, so as to interfere in any manner with the "freedom of the press. Liberty of circulating is as essen- "tial to that freedom as liberty of publishing; indeed, with- "out the circulation, the publication would be of little value. "If, therefore, printed matter be excluded from the mails, "its transportation in any other way can not be forbidden "by Congress."

The *Jackson* case was decided in 1877, and arose under the Act of 1876. After the Act of 1890 was passed, its constitutionality was tested in the case of *in re Rapier, supra.* This latter case was argued by the respective counsel at great length, and the court was asked to overrule the decision in *ex parte Jackson, supra.* Chief Justice FULLER, delivering the opinion of the court, said (p. 133):

"The question for determination relates to the constitu- "tionality of Section 3894 of the Revised Statutes as amend- "ed by that act. In *ex parte Jackson*, 96 U. S., 727, it "was held that the power vested in Congress to establish "post-offices and post-roads embraced the regulation of the "entire postal system of the country, and that under it "Congress may designate what may be carried in the mail "and what excluded; that in excluding various articles from "the mails the object of Congress is not to interfere with "the freedom of the press or with any other rights of the "people, but to refuse the facilities for the distribution of "matter deemed injurious by Congress to the public morals; "and that the transportation in any other way of matters "excluded from the mails would not be forbidden. Unless "we are prepared to overrule that decision, it is decisive of "the question before us." * * *

(P. 135.) "In short, we do not find sufficient grounds "in the arguments of counsel, able and exhaustive as they "have been, to induce us to change the views already ex- "pressed in the case to which we have referred. We adhere "to the conclusion therein announced."

Not only do these decisions show that the court throughout based its opinions upon the fact that all sources other than the mails were open for the circulation of lottery advertisements, but the arguments of counsel for the government proceeded upon that theory. In the argument of Attorney General Miller, in the *Rapier* case, appear the following statements, remarkable in the light of the present act. (We quote from the arguments as published in 143 U. S., L. C. P. Co. Ed., as the Attorney General's argument does not appear in the Davis Edition):

"The main effort," said the Attorney General, "of coun-
"sel for petitioners, in each of the briefs, seems to be to
"becloud the issue. To this end their arguments assume that
"the refusal of the general government to be the instru-
"mentality for the circulation of lottery literature, is the
"same thing as forbidding the publication or circulation
"of such literature. The only escape from a violation of
"the prohibition in the first amendment to the Federal Con-
"stitution against making a law abridging the freedom of
"the press, is for every official of the post-office department
"to become the servant, and every carrier the errand boy
"of the Louisiana Lottery Company.

"They totally ignore the fact that the sole effect of the
"act of Congress is, that the general government, its offi-
"cers, employes and agencies, shall in no way aid or abet
"this business; that its mail bags and the hands of its serv-
"ants, shall not be used in spreading and manipulating
"snares for its unwary victims; that it simply says to Fed-
"eral officials, 'Hands off.'" (p. 98.)

Again on page 100:

"Seriously, is it not too plain for argument that under
"this first amendment to the Constitution, Congress does
"its whole duty to the press when it fails to put any re-

" striction whatever upon the printing, publication or circu-
" lation thereof, by those interested therein, through such
" private agencies as they are able to command? It is sub-
" mitted that no question under the first amendment of the
" Constitution is in issue in this case, nor can be in issue,
" so far as the Louisiana Lottery is concerned, until a stat-
" ute shall be passed forbidding, not merely the circulation
" of papers carrying its advertisements through the mails,
" but forbidding the circulation of such newspapers through
" any agency whatsoever."

Assistant Attorney General Maury, on page 102, concluded his argument thus:

" The exclusion of newspapers from the mails, which con-
" stitute but one means of circulation, is not an abridgement
" of the freedom of the press, all other means of circulation
" being left open to them."

In the opinion of Judge JENKINS, found on page 103 of the record in this case, he says:

" In considering the constitutionality of this act of Con-
" gress I have read the opinion in the case cited, *France* v.
" *United States*, 164 U. S., 676, in which the Supreme Court
" declined to pass upon its constitutionality. I have care-
" fully considered the matter, and I think it fairly a debat-
" able and doubtful question whether the act will be held
" to be constitutional."

We respectfully submit that the judgment of the lower court should be reversed and the petitioner discharged.

MORITZ ROSENTHAL,
JOSEPH B. DAVID,
Attorneys for Appellant.

APPENDIX.

Act of 1827 (March 2, 1827) (4 Stat. L., 238, Sec. 6):

"That no postmaster or assistant postmaster shall act as "agent for lottery offices or under any color of purchase, or "otherwise, send lottery tickets; nor shall any postmaster "receive free of postage or frank lottery schemes, circulars "or tickets."

Act of 1868 (July 27, 1868) (15 Stat. L., 194-196, Sec. 13):

"That it shall not be lawful to deposit in a post-office, to "be sent by mail, any letters or circulars concerning lotteries, "so-called gift concerts or similar enterprises, offering prizes "of any kind on any pretext whatever."

Act of 1872 (June 8, 1872) (17 Stat. L., 302):

"Sec. 3894. No letter or circular concerning illegal lot- "teries, so-called gift concerts, or other similar enterprises, "offering prizes, or concerning schemes devised and intended "to deceive and defraud the public for the purpose of ob- "taining money under false pretences, shall be carried in "the mail. Any person who shall knowingly deposit or send "anything to be conveyed by mail in violation of this section "shall be punishable by a fine not more than five hundred dol- "lars nor less than one hundred dollars, with costs of prose- "cution."

Act of 1876 (July 12, 1876) (19 Stat. L., 90, Sec. 2):

Section 3894 (as above) was amended by striking out the word "illegal."

Act of September 19, 1890 (1 Supp. Rev. St., 803):

"Be it enacted, etc., that section thirty-eight hundred and "ninety-four of the Revised Statutes be, and the same is "hereby amended to read as follows:

"Sec. 3894. No letter, postal card or circular concerning "any lottery, so-called gift concert, or other similar enter- "prise offering prizes dependent upon lot or chance, or con- "cerning schemes devised for the purpose of obtaining money "or property under false pretenses, and no list of the draw- "ings at any lottery or similar scheme, and no lottery ticket, "or part thereof, and no check, draft, bill, money, postal note "or money order for the purchase of any ticket, tickets or "part thereof, or of any share or any chance in any such "lottery or gift enterprise shall be carried in the mail or de- "livered at or through any post-office or branch thereof, or by "any letter carrier.

"Nor shall any newspaper, circular, pamphlet or publica- "tion of any kind containing any advertisement of any lot- "tery or gift enterprise of any kind offering prizes depend- "ent upon lot or chance, or containing any list of prizes "awarded at the drawings of any such lottery or gift enter- "prize, whether said list is of any part or of all of the draw- "ing, be carried in the mail or delivered by any postmaster "or letter carrier.

"Any person who shall knowingly deposit or cause to be "deposited, or who shall knowingly send or cause to be sent, "anything to be conveyed or delivered by mail in violation of "this section or who shall knowingly cause to be delivered by "mail anything herein forbidden to be carried by mail, shall "be deemed guilty of a misdemeanor, and on conviction "shall be punished by a fine of not more than five hundred "dollars or by imprisonment for not more than one year, or "by both such fine and imprisonment for each offense."

Act of March 2, 1895 (2 Supp. Rev. St., 435):

Chap 194. An Act for the Suppression of Lottery Traffic Through National and Interstate Commerce and the Postal Service Subject to the Jurisdiction and Laws of the United States.

"Be it enacted, etc., that any person who shall cause to "be brought within the United States from abroad, for the "purpose of disposing of the same, or deposited in or carried "by the mails of the United States, or carried from one state "to another in the United States, any paper, certificate or in- "strument purporting to be or represent a ticket, chance, "share or interest in or dependent upon the event of a lot- "tery, so-called gift concert, or similar enterprize, offering "prizes dependent upon lot or chance, or shall cause any ad- "vertisement of such lottery, so-called gift concert or sim- "ilar enterprise, offering prizes dependent upon lot or chance, "to be brought into the United States, or deposited in or car- "ried by the mails of the United States, or transferred from "one state to another in the same, shall be punishable in the "first offense by imprisonment for not more than two years "or by a fine of not more than one thousand dollars, or both, "and in the second and after offenses by such imprisonment "only."

No. 106 & 2

Br. of Guthrie for Appellant.

Office Supreme Court U.S.
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Supreme Court of the United States.

OCTOBER TERM, 1900.

No. 106.

CHARLES F. CHAMPION,
Appellant,

vs.

JOHN C. AMES, United States Marshal.

Appeal from the Circuit Court of the United States for the Northern District of Illinois.

BRIEF ON BEHALF OF APPELLANT.

(FEDERAL REGULATION OF LOTTERIES.)

WILLIAM D. GUTHRIE,
Of counsel for appellant.

WASHINGTON, February, 1901.

[17,474.]

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Supreme Court of the United States.

OCTOBER TERM, 1900.

No. 106.

CHARLES F. CHAMPION,
Appellant,

vs.

JOHN C. AMES, United States Marshal.

Appeal from the Circuit Court of the United States for the Northern District of Illinois.

BRIEF ON BEHALF OF APPELLANT.

The question presented by this appeal is as to the constitutional power of Congress to prohibit and punish as for a crime any one who shall cause to be "carried from one state to another in the United States, any paper, certificate or instrument purporting to be or represent a ticket, chance, share or interest in or dependent upon the event of a lottery, so-called gift concert, or similar enterprise, offering prizes dependent upon lot or chance, or shall cause any advertisement of such lottery, so-called gift concert, or similar enterprise offering prizes dependent upon lot or chance, to be . . . transferred from one state to another in the same," as provided in the act of March 2, 1895, c. 191, § 1; 28 Stat. 963. Section 1 of the act reads as follows:

> "*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That any person who shall cause to be brought within the United States from abroad, for the purpose of disposing of the same, or deposited in or carried by the mails of the United States, or carried from one State to another in the United States, any paper, certificate, or instrument purporting to be or represent a ticket, chance, share, or interest in or

> dependent upon the event of a lottery, so-called gift concert, or similar enterprise, offering prizes dependent upon lot or chance, or shall cause any advertisement of such lottery, so-called gift concert, or similar enterprise, offering prizes dependent upon lot or chance, to be brought into the United States, or deposited in or carried by the mails of the United States, or transferred from one State to another in the same, shall be punishable in the first offense by imprisonment for not more than two years, or by a fine of not more than one thousand dollars, or both, and in the second and after offenses by such imprisonment only."

In the case at bar, the overt act charged in each count of the indictment is the delivery in the state of Texas of a box containing lottery tickets, papers or certificates to the Wells-Fargo Express, a corporation engaged in carrying freight and packages, for the purpose of having the box carried to Fresno, in the state of California, or to Ogden, in the state of Utah (record, pp. 15, 23). The offence charged is that the attempt to have lottery tickets, papers or certificates carried or transferred from one state to another is a crime constituted such by virtue of the above statute.

The statute in question purports to regulate three distinct and separate branches of the subject of lotteries, viz.: (1) bringing lottery tickets, etc., within the United States from abroad; (2) depositing any such matter in the mails of the United States, and (3) carrying or transferring such matter from one state to another in the United States by means or medium other than the mails.

The first branch involves the regulation of our relations with foreign countries, the second involves the regulation of the United States mails, and the third is an attempt to regulate intercourse among the people of

the respective states in a matter which, it is submitted, does not constitute commerce within any proper meaning of that term.

I.

As to the first branch of this statute, it may well be conceded that Congress, under the plenary power to regulate our relations with foreign countries, may exclude persons, commodities or printed matter of any nature whatsoever, whether or not relating to or connected with commerce. In this case, it is not necessary in the slightest degree to challenge the power of Congress—the legislative power of a sovereign nation—to exclude foreign persons or commodities or printed matter in its judgment and discretion. When we say that Congress may exclude or deport foreigners or their products or publications from the United States, we are but recognizing the ancient doctrine of international law that an alien or an alien's property comes into the territory of a sovereign nation only by its sufferance, and may be excluded at its will. And whether the exclusion be for the purpose of self-defense, or for the general welfare of the people, or as an incident to the regulation of imports, the right to exclude or deport is as much a part of the sovereign's prerogative as is the right to make treaties giving to foreigners the privilege of abiding or of bringing or selling their goods or publications within the sovereign's domain. That this attribute of sovereignty has been surrendered by and does not belong to the states cannot for a moment be doubted, for the states are forbidden to enter into any form of treaty[1]; nor can it be questioned that the whole power to regulate every form of relations with foreign countries must of necessity reside in the

[1] Section 10 of Article I of the Constitution of the United States.

sovereign newly created by the Constitution of the United States.[1]

As Mr. Justice Gray said in *Nishimura Ekiu* v. *United States*, 142 U. S. 651, 659;

> "It is an accepted maxim of international law, that every sovereign nation has the power, as inherent in sovereignty, and essential to self-preservation, to forbid the entrance of foreigners within its dominions, or to admit them only in such cases and upon such conditions as it may see fit to prescribe. Vattel, lib. 2, §§ 94, 100; 1 Phillimore (3d ed.), c. 10, § 220. In the United States this power is vested in the national government, to which the Constitution has committed the entire control of international relations, in peace as well as in war."

And in the subsequent case of *Fong Yue Ting* v. *United States*, 149 U. S. 698, 707, Mr. Justice Gray again said:

> "The right of a nation to expel or deport foreigners who have not been naturalized or taken any steps towards becoming citizens of the country, rests upon the same grounds, and is as absolute and unqualified as the right to prohibit and prevent their entrance into the country."

Many of the considerations which are of a national character and which come up between the United States as a sovereignty and foreign nations wholly disappear when we contemplate interstate relations. We must recognize that the nature and source of the power to regulate domestic commerce is far different from the nature and source of the power to regulate international commerce. In the case of interstate commerce, there is no implied power in Congress. In the case of foreign commerce, there is no limitation upon the power of Congress and no implied or reserved power in the states. When regulating inter-

[1] *Head Money Cases*, 112 U. S. 580, 591.

state commerce, the only power Congress exercises is that expressly delegated by the states, and it is limited and hedged in by the local police and municipal powers reserved to the states. When regulating commerce or intercourse with foreign nations, the extent of the power delegated to the federal government is as unlimited as that of any other sovereignty. It rests not merely on the commerce clause, but on the power to lay duties and imposts, to make treaties, to provide for the common defense, to wage war, etc. But when considering a statute regulating interstate commerce, we must realize that the exercise of power in the given case must not trench upon "the powers not delegated to the United States by the Constitution," but by that instrument expressly "reserved to the states respectively or to the people"[1]— considerations and limitations which may have little or no weight in regulating foreign affairs.[2]

Under the regulation of what is generally termed foreign commerce or intercourse, Congress has ample power not only to prevent the introduction of foreign lottery matter, but in order to render such inhibition effective, it may prohibit the possession of such matter or its transfer from one state to another just as fully as it may prohibit the possession or transfer of smuggled imports or contraband goods. In the case at bar, however, the offense of bringing lottery matter from abroad is not charged in the indictment, and is not presented for adjudication.

The earliest acts of Congress in regard to the introduction of goods into this country were acts imposing duties on imports—which were laid upon all goods quite irrespective of their commercial qualities—and acts inci-

[1] Tenth Article of Amendment to the Constitution of the United States.

[2] Indeed, Madison placed the power to regulate intercourse with foreign nations in a class distinct and separate from the power to regulate interstate commerce. The Federalist; Hamilton's Works, Lodge's ed., vol. 9, pp. 250, 258, 262.

dentally affecting the goods while primarily regulating the carrying trade. Carrying goods was obviously as much commerce, and as subject to commercial regulation, as the carrying of passengers. To promote the carrying trade, registration of vessels of the United States has been provided for with rules for their construction, equipment and transfer. And in regulating maritime contracts under the power over foreign commerce and admiralty jurisdiction, Congress has punished the theft of shipwrecked goods even when they have been washed ashore, has revised the liability of shipowners and incidentally determined the validity of exemptions from liability in bills of lading.[1] So, also, in order to promote the export trade in live-stock, regulations have been made to prevent the exportation of diseased cattle.[2] Provision, too, has been made for the inspection of imported meat; an act forbids the importation of poisonous food and infected animals, and provides for the total suspension of importation of animals whenever "it shall be necessary for the protection of animals in the United States against infectious or contagious diseases."[3] In so far as these regulations are more than regulations of the carrier, they are in furtherance of foreign traffic in the goods in question. A possible exception may be the act of August 30, 1890; but that was passed, not under the commerce clause, but as an auxiliary of the power to regulate import duties, and to say what goods shall or shall not be free; and the object of the act is to provide that no detriment shall come to the states by reason of the enforced admission of foreign goods within their borders.

Turning to commerce between the states, we find that Congress no longer regulates it in conjunction with its

[1] Act of February 13, 1893, c. 105; 27 Stat. 445; R. S. 4285; *Lord* v. *Steamship Co.*, 102 U. S. 541; cf. *People* v. *Raymond*, 34 Cal. 492.

[2] Act of May 29, 1884, c. 60, §§ 4, 5; 23 Stat. 31.

[3] Act of August 30, 1890, c. 839, § 9; 26 Stat. 416.

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powers over foreign relations or with its power over imports. Articles brought for sale from one state to another are not imports.[1] In regulating interstate commerce pure and simple, Congress has busied itself principally with laying down the law for carriers, as in regulating rates and placing them under the direct supervision of the interstate commerce commission.[2] Such also are acts regulating bridges,[3] telegraphs[4] and the coasting trade.[5]

In connection with this point, a legislative episode of 1836 may be mentioned in which an attempt was made to prevent the circulation of anti-slavery publications from one state to another by excluding them from the United States mails. For a number of years the circulation of such documents had caused bitter feeling in the southern states; and in 1835 the governor of North Carolina, in his address to the legislature, had urged the adoption of stringent provisions against the circulation of these publications, and had advocated a union of the slave states to protect themselves against this "pest".[6] In

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[1] *Woodruff* v. *Parham*, 8 Wall. 123.

[2] *Railroad Company* v. *Fuller*, 17 Wall. 560; *Railroad Company* v. *Richmond*, 19 Wall. 584; *Phila. Steamship Co.* v. *Pennsylvania*, 122 U. S. 326; *McCall* v. *California*, 136 U. S. 104; *Norfolk, etc., Railroad Co.* v. *Penn.*, 136 U. S. 114; *Crutcher* v. *Kentucky*, 141 U. S. 47; *Carlon* v. *Illinois Central Railroad*, 59 Iowa 148.

[3] *Luxton* v. *North River Bridge Co.*, 153 U. S. 525; *State of Pennsylvania*, v. *Wheeling and Belmont Bridge Co.*, 18 How. 421; *The Clinton Bridge*, 10 Wall. 454; *South Carolina* v. *Georgia et al.*, 93 U. S. 4; *Bridge Co.* v. *U. S.*, 105 U. S. 470; *Miller* v. *Mayor of New York*, 109 U. S. 385; *Gloucester Ferry Co.* v. *Pennsylvania*, 114 U. S. 196; *Fargo* v. *Michigan*, 121 U. S. 230.

[4] *Pensacola Tel. Co.* v. *Western Union Tel. Co.*, 96 U. S. 1; *Telegraph Co.* v. *Texas*, 105 U. S. 460; *W. U. Telegraph Co.* v. *Pendleton*, 122 U. S. 347; *Ratterman* v. *Western Union Tel. Co.*, 127 U. S. 411; *Leloup* v. *Port of Mobile*, 127 U. S. 640.

[5] *Sinnot et al.* v. *Davenport et al.*, 22 How. 227; *Foster et al.* v. *Davenport et al.*, 22 How. 244; *The Daniel Ball*, 10 Wall. 557; *Moran* v. *New Orleans*, 112 U. S. 69.

[6] 49 Niles' Register, 228.

many of the southern states laws existed prohibiting all circulation of anti-slavery documents, whether they came from another state or not.[1] The general impression which prevailed in the South was that these regulations applied even to the United States postmasters, and rendered them liable to conviction for delivering the publications of the anti-slavery societies. Some postmasters, both in the North and South, excluded these publications from the mails that passed through their offices, and Kendall, the Postmaster General, though unable to find authority justifying him in ordering such action, intimated that in their position he should pursue a similar course.[2] In 1835, President Jackson, in his message, recommended that a bill be passed excluding these publications from the mails. This message was referred to a select committee, and on the 4th of February, 1836, a bill was reported by Mr. Calhoun making it a penal offense to transmit by the mails all anti-slavery documents which were prohibited by the states to which they were addressed. His doctrine was that Congress had no power under any clause of the Constitution to forbid directly the transmission of these publications, that Congress had no power to interfere with the internal regulations of the states, but that in furtherance of the police regulations of the several states, Congress might exclude from the mails papers which were condemned by those police regulations.[3] Buchanan placed his support of the bill on higher grounds, and thought that, under the power of Congress to regulate the mails, it might exclude from the mails whatever it saw fit, and in

[1] North Carolina, 1830, Laws, vol. 14, p. 10, and Maryland, 1831; 49 Niles' Register, 228. Cf. Rev. Sts. La. 1852.

[2] 48 Niles' Register, 447-448; 49 Niles' Register, 7-8.

[3] Cong. Globe, 24th Cong., 1st Sess., 10, 164, 165, 347.

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the bill under discussion, he agreed to the adoption of state laws, not as a source of power, but as a convenient test of what publications should be held incendiary.[1] The opposition to the bill was based upon constitutional as well as political grounds. The constitutional objection made was that it abridged the freedom of speech and of the press. This was the ground taken by Davis of Massachusetts[2] and by Webster.[3] On the 8th of June the bill was rejected by a vote of 25 to 19.[4]

The significance of this episode lies in the fact that Congress was grappling with the proposition to regulate the transmission from state to state of documents which lacked entirely the quality of merchandise. It was admitted throughout the debate that if Congress could not regulate this matter indirectly through the mails it could not regulate it at all; and no suggestion was made throughout the debate that such a bill could be passed under the commerce clause.[5]

From this general review of the subject, it must be clear that the word "commerce," although construed broadly when it is used in a grant of sovereign power with respect to foreign relations, should be construed strictly when applied purely to interstate relations, and that there is no authority for saying that interstate commerce includes the mere transit from state to state of an individual or the mere carriage or transfer of an article which is not a subject or article of commerce.

It has not been necessary for this court in any case yet arising to consider and analyze in juxtaposition the power

[1] Cong. Globe, 24th Cong., 1st Sess., App. 454.
[2] " " " 348.
[3] " " " App. 453.
[4] " " " 539.
[5] We say this, fully aware of the other view taken by Mr. Justice Field in Jackson's case, 96 U. S. 727. We find no support for his view in the debate.

to regulate foreign affairs, commerce and intercourse on the one hand and the power to regulate interstate commerce on the other. The difference has been as yet only commented on, but it is obviously great and broad. The present case may be deemed to present that interesting question, and perhaps may lead to the declaration of a sound doctrine that in the one case the power of the legislative branch of the sovereign nation is practically absolute, whilst in the other case the federal legislative power is necessarily limited by the nature and essence of the reserved powers in the states, and by the extremely delicate machinery of our system of dual government.

Referring to the difference between the power to regulate foreign commerce and the power to regulate interstate or domestic commerce, Mr. Randolph, in his recent excellent work on "The Law and Policy of Annexation" uses the following language (pp. 94-98):

> "Now the power conferred in respect of foreign, Indian, and interstate or domestic commerce is in each case 'to regulate,' and from this identity in the terms of the grants it has been assumed that the three powers are co-extensive. But it will not be difficult to show that the power over domestic commerce is not identical with the power over commerce with foreign nations,[1] and with the Indians. The assertion of identity between the powers over domestic and Indian commerce may be dismissed almost summarily. The Indian tribes are, in the language of Chief Justice Marshall, 'in a state of pupilage. Their relation to the United States resembles that of a ward to its guardian. They look to our Government for protection; rely upon its kindness and its power; appeal to it for relief to their wants; and address the President as their great father."[2] Whatever relation the people of the United States may bear to the

[1] See Madison's Works, IV, 15; *Groves* v. *Slaughter*, 15 Peters, 449, 505.

[2] *The Cherokee Nation* v. *The State of Georgia*, 5 Peters, 1, 17.

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Federal Government it is not this. The dependent position of the Indians justified the Supreme Court in saying: 'As long as these Indians remain a distinct people, with an existing tribal organization, recognized by the political department of the Government, Congress has the power to say with whom and on what terms they shall deal, and what articles shall be contraband.'[9] Whatever power Congress may have over domestic commerce, it is not this. It is a fair rule of interpretation that, when powers in respect of several subjects are assumed to be co-extensive merely because of identity in the terms of the grants, the differentiation of one subject discredits the assumption as to the rest. But we need not stop here; for, in point of fact, the assumed parallel between domestic and foreign commerce is quite as illusory as in the case of Indian trade, and for the same reason—a radical difference in the status of the parties.

"The United States deal with a foreign nation as one sovereign with another. They have no connection, and, apart from the obligation of treaties, no conventional relation with the foreign state. Their attitude toward other nations is dictated by policy, tempered in some directions by treaty and international law; and they may discriminate between them—inclining toward one and away from another—as their interests require.

"If Congress may interdict foreign commerce, it is by way of carrying out the policy of a sovereign—the United States—in opposition to, or disregard of the policy of other sovereigns to whom it owes no legal duty in the premises.

"Obviously a right to interdict, which may inhere in the power to regulate commerce with foreign or dependent nations cannot be attributed by analogy to the power to regulate our own. Because we may forbid intercourse with a foreign nation, essentially an unfriendly act despite any protestation to the contrary, and forbid private dealings with Indians in order to protect childish wards from the rapacity of traders, it does not follow that we may turn the

[9] *U. S. v. 43 Gallons of Whiskey, etc.*, 93 U. S. 188, 195.

weapon of embargo against our own countrymen, or treat them as children of a 'great father.'

"In fact, the need of commercial unity was the greatest incentive to the establishment of 'the more perfect Union' assured by the Constitution. The States did not transfer to Congress the sovereign power of restriction which each possessed. They renounced these powers, left them in the air, and authorized Congress to maintain the freedom of trade established by their renunciation. To regulate domestic commerce, then, is to facilitate an intercourse placed beyond reach of prohibition, and, while regulations may in fact involve some restraint upon the conduct of particular intercourse, they have their warrant and purpose in the facilitation of all intercourse."

II.

As to the second branch of the statute, which involves the power to exclude lottery tickets, advertisements, etc., from the United States mails, it is sufficient to say that this portion of the statute has been upheld on the ground of the exclusive and comprehensive power vested in Congress to establish post offices and post roads, which embraces the regulation of the entire postal system of the country. Under this broad and almost unlimited power, Congress can designate what shall be carried in the mails and what shall be excluded. This point was settled by the decisions of the court in *Ex parte Jackson*, 96 U. S. 727, 732, and *In re Rapier*, 143 U. S. 110, 133.

III.

As to the third branch of the statute, which involves the power of Congress to forbid the carriage or transfer of lottery tickets, advertisements, etc., from state to state, it is to be at once observed that although the point has not yet been expressly adjudicated, this court has nevertheless said that no such power exists. Thus, in *Ex*

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parte Jackson, 96 U.S. 727, 735, Mr. Justice Field, delivering the unanimous opinion of the court, said:

> "But we do not think that Congress possesses the power to prevent the transportation in other ways, as merchandise, of matter which it excludes from the mails. To give efficiency to its regulations and prevent rival postal systems, it may perhaps prohibit the carriage by others for hire, over postal routes, of articles which legitimately constitute mail matter, in the sense in which those terms were used when the Constitution was adopted, consisting of letters, and of newspapers and pamphlets, when not sent as merchandise; but further than this its power of prohibition cannot extend."

And in the subsequent case of *In re Rapier*, 143 U. S. 110, 133, Mr. Chief Justice Fuller, delivering again the unanimous opinion of the court, stated that the former case had held "that the transportation in any other way of matter excluded from the mails would not be forbidden."

That question is now distinctly presented for adjudication, and the following argument is submitted in support of the contention that the court should adhere to the view expressed by Mr. Justice Field. The court below considered it a debatable and doubtful question whether the act would be held constitutional by this court (Jenkins, C. J., record, p. 103).

IV.

The portion of the act of March 2, 1895, with which we are now concerned, does not regulate any commerce in the sense in which that word is used in the Constitution of the United States. The first portion relating to foreign lotteries, forbids the introduction into the United States of any paper concerning lotteries "for the purpose of disposing of the same." Admitting, for the purpose of argument, that this provision is a regulation of traffic in such

papers, within the scope of the power of Congress to control our relations with foreign countries, we find that the remainder of the act provides simply against the passing from state to state, by the mails or by any other means, of any lottery ticket or advertisement without any reference whatever to any "purpose of disposing of the same." In so far as this provision is aimed against the transit of the paper, it deals with no commerce. Nor is it a regulation of a carrier, whose business is commerce irrespective of what it carries. A thing that is not in itself a subject or article of commerce, cannot surely become invested with a commercial character by being transferred from one state to another. The paper does not become commercial simply because in furtherance of an interstate business. It is merely in furtherance of a lottery, and a lottery is not commerce.

In so far as the law is aimed against the lottery business, either at the place where the paper started or delivery was made, or at the place where the paper will find itself, or where the contract may take effect at the end of its journey, it is an attempt to interfere with the local police regulations of either place. The lottery business, wherever found, is not interstate commerce. It is true that the lottery business, which was once extensively engaged in, has gradually fallen into disrepute, and that the states, in the exercise of their police powers, have one by one prohibited them, and in aid of this prohibition passed laws forbidding the introduction of advertisements and papers from other states. But the gradual condemnation of lotteries did not make the business interstate commerce if it was not so before, or diminish the power of the respective states to permit, regulate or prohibit them. If the change had any effect, it must have been the reverse.

A conviction for selling lottery tickets for the national lottery, authorized by the act of Congress of May 4, 1812, was sustained under the statute of Virginia in the case of *Cohens* v. *Virginia*, 6 Wheat., 264. The state statute in that case forbade the sale within the state of any ticket in a lottery not authorized by the laws of Virginia. The main argument in the case was devoted to the question whether the lottery was not a fiscal agent of the Government with which no state could interfere, and the court held that it was not. Chief Justice Marshall regarded the law as a penal regulation, having for its sole object the internal government of the state. Yet if the lottery ticket had been an article of commerce, the Virginia act would obviously have been invalid.[1]

The primary and fundamental inquiry upon the merits is, therefore, whether a lottery ticket or policy or advertisement is or is not an article of commerce or constitutes in any sense a transaction of interstate or domestic commerce within any proper meaning of the word.

As was said by Mr. Justice Miller in the *Trade-Mark Cases*, 100 U. S. 82, 96:

> "When, therefore, Congress undertakes to enact a law, which can only be valid as a regulation of commerce, it is reasonable to expect to find on the face of the law, or from its essential nature, that it is a regulation of commerce with foreign nations, or among the several States, or with the Indian tribes. If not so limited, it is in excess of the power of Congress."

Transactions connected with lotteries do not constitute a part of the commerce between the states any more, for example, than issuing a policy of insurance, which is an analogous form of wagering contract.

In the case of *Paul* v. *Virginia*, 8 Wall. 168, 183, it was distinctly held that the sending of insurance policies,

[1] *Welton* v. *State of Missouri*, 91 U. S. 275; *Webber* v. *Virginia*, 103 U. S. 344.

say from New York to Virginia, to be there delivered to the insured on payment of premium, was not interstate commerce. The remarks and reasoning of the court, by Mr. Justice Field, apply as much to a lottery policy or ticket as to a policy of insurance, viz.:

> "Issuing a policy of insurance is not a transaction of commerce. The policies are simple contracts of indemnity against loss by fire, entered into between the corporations and the assured, for a consideration paid by the latter. These contracts are not articles of commerce in any proper meaning of the word. They are not subjects of trade and barter offered in the market as something having an existence and value independent of the parties to them. They are not commodities to be shipped or forwarded from one State to another, and then put up for sale. They are like other personal contracts between parties which are completed by their signature and the transfer of the consideration. Such contracts are not interstate transactions, though the parties may be domiciled in different states. The policies do not take effect—are not executed contracts—until delivered by the agent in Virginia. They are, then, local transactions, and are governed by the local law. They do not constitute a part of the commerce between the states any more than a contract for the purchase and sale of goods in Virginia by a citizen of New York whilst in Virginia would constitute a portion of such commerce."

Again, in *Hooper* v. *California*, 155 U. S. 648, 653, 655, Mr. Justice White said:

> "Whilst it is true that in *Paul* v. *Virginia*, and in most of the cases in which it has been followed, the particular contract under consideration was for insurance against fire, the principle upon which these cases were decided involved the question of whether a contract of insurance, of any kind, constituted interstate commerce. The court in reaching its conclusion upon this question was not concerned with any matter of distinction between marine and fire insurance, but proceeded upon a broad analysis of the

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nature of interstate commerce and of the relation which insurance contracts generally bear thereto. . .

"The business of insurance is not commerce. The contract of insurance is not an instrumentality of commerce. The making of such a contract is a mere incident of commercial intercourse, and in this respect there is no difference whatever between insurance against fire and insurance against 'the perils of the sea.'"

And, in *New York Life Insurance Co.* v. *Cravens*, 178 U. S. 389, 401, Mr. Justice McKenna said:

"Is the statute an attempted regulation of commerce between the States? In other words, is mutual life insurance commerce between the States?

"That the business of fire insurance is not interstate commerce is decided in *Paul* v. *Virginia*, 8 Wall. 168; *Liverpool Ins. Co.* v. *Mass.*, 10 Wall., 566; *Phila. Fire Asso.* v. *New York*, 119 U. S. 110. That the business of marine insurance is not is decided in *Hooper* v. *California*, 155 U. S. 648. In the latter case it is said that the contention that it is 'involves an erroneous conception of what constitutes interstate commerce.'

"We omit the reasoning by which that is demonstrated, and will only repeat, 'The business of insurance is not commerce. The contract of insurance is not an instrumentality of commerce. The making of such contract is a mere incident of commercial intercourse, and in this respect there is no difference whatever between insurance against fire and insurance against the 'perils of the sea'.' And we add, or against the uncertainty of man's mortality."

A lottery contract is, in all its aspects, of the same nature as an insurance contract. They are both aleatory. An aleatory contract is one whose fulfillment depends on a future and uncertain event. Such are contracts of annuity, insurance, lottery and other forms of gambling. In the case of insurance, the company or underwriter says, "If by a future casualty your house, your barn or your ship be lost, we will pay you so much." The lot-

tery company similarly says, "If a certain number be drawn, we will pay you so much."

It cannot be denied that insurance policies are essentially wagers and constitute aleatory contracts substantially the same as the contract of lottery. Both forms of contract depend upon chance and uncertain events, and in principle cannot be distinguished in their nature.[1]

If, therefore, insurance policies, although connected with property which is the subject matter of interstate or foreign commerce, be not commerce within the true meaning of the Constitution of the United States, it must logically follow that the other forms of aleatory contracts, such as lottery tickets or policies, likewise, do not come within the scope of the commerce clause.

This court having definitely settled that a state regulation of the business of interstate or foreign insurance is not a regulation of commerce, does it not logically follow that the court could not uphold an act of Congress which attempted to regulate insurance or, for example, to forbid the carriage or transfer of insurance policies or tickets or other printed matter from state to state by agencies other than the mails? Would it not be held that any such statute was not a regulation of interstate commerce in any proper meaning of the term and that the power to regulate insurance as well as other forms of business intercourse had not been delegated to Congress? It is true that it is now desirable and expedient to have Congress regulate the

[1] Pothier's Obligations, Evans' Transl., vol. I., pp. 9–10; Louisiana Civil Code, act 1776; Civil Code of Spain of 1889, Title XII., U. S. Govt. Transl. 1899, pp. 230-232; May on Insurance, (4th ed.), vol. 1, p. 5; Clark on Contracts, pp. 405–406; Lawson on Contracts, secs. 284–287; Hollingsworth on Contracts, pp. 229–232; Anson on Contracts, (2nd Am. ed.); pp. 232–233; Angell on Fire & Life Insurance, pp. 12, 14; Joyce on Insurance, vol. 1, secs. 2, 7; Emerigon, Meredith's Transl., p. 13; Richards on Insurance, § 20.

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subject of insurance, particularly in connection with vessels engaged and commodities used in interstate commerce;[1] but that consideration cannot draw to Congress a subject not delegated to it by the Constitution.

This feature of insurance, also, presents quite a striking example of the force of the suggestion heretofore made as to the difference in the nature of the power to regulate interstate commerce and foreign commerce. No one would challenge the power of Congress, by treaty or otherwise, to enact that foreign insurance companies should not be permitted to enter the United States by their agents or to send insurance policies for delivery there. Yet, if *Paul* v. *Virginia* and *Hooper* v. *California* and *New York Life Ins. Co.* v. *Cravens* are sound law and are not to be now overruled, Congress would have no power whatever to regulate the business of interstate insurance.

So, too, can it be doubted that Congress could by treaty provide that foreign insurance companies and underwriters might enter the territory of the United States and make contracts of insurance? That would clearly be within the power of Congress to regulate foreign relations, although no power exists to give domestic insurance companies such rights among the respective states.

V.

Let us suppose, as a test, that Congress should expressly authorize the circulation of Louisiana lottery tickets among the respective states. We are not now, of course, contemplating an attempt of the federal government to raise revenue or war funds by a lottery, which would present entirely different questions. The only theory upon which the power of Congress to act at

[1] *Hooper* v. *California*, 155 U. S. 648.

all in the case of state lotteries could be sustained would be under the commerce clause. Is it conceivable that this court would hold that such an enactment by Congress was a regulation of commerce before which the police laws of the states must fall, and that Congress could thus compel the respective states to permit traffic in lottery tickets authorized by another state or states? The conclusive answer would be that that was a matter within the police power reserved to the states and that it was never intended that any such power, express or implied, should be delegated to Congress by the grant of the power to regulate commerce.

We may also suppose, for example, that the Connecticut legislature desired, in the year 1796, to authorize a lottery, as it did in 1733, in order to raise funds for a new building for Yale College, and that the New York legislature desired to aid this purpose and authorized the sale of such lottery tickets.[1] Would an act of Congress prohibiting the carriage or transfer of such lottery matter from state to state other than by the mails have been a valid exercise of the power to regulate commerce? Indeed, in 1806, the legislature of Massachusetts authorized the raising of funds by a lottery for Harvard College so as to build Holworthy Hall and repair Massachusetts Hall. Could Congress have interfered with the transfer of these tickets to other states for the purposes of sale or have compelled the states to permit their sale?

But, what is, perhaps, more interesting, let us consider the question in connection with public revenue. The Continental Congress raised money for the army by means of a lottery[2] and Congress itself, under the Constitution,

[1] Spofford, Annual Report American Historical Association, 1892, pp. 171–195; Conn. stats. 1, 1736, p. 284; 1 Kent & Redcliffe, Laws of New York, 1801.

[2] Spofford, *supra*.

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has authorized lotteries.[1] Clearly, in no reasonable meaning of the commerce clause could it have been said that this legislation constituted a regulation of commerce. If the nation were to-day laboring under some great reverse and vicissitude of fortune and Congress were compelled to raise war funds by lotteries, its power to prevent the states from interfering with this perhaps vital and necessary source of revenue would not be under the commerce clause. This point was not necessarily involved in *Cohens* v. *Virginia*, 6 Wheat. 264, and the power of Congress to compel the states to permit the sale of lottery tickets issued under federal authority was not adjudicated. A state may desire to aid a public purpose by means of a lottery, as Massachusetts raised funds by a lottery, in 1780, for clothing the Massachusetts part of the Continental army.[2] Could Congress compel the other states to permit the sale of Massachusetts lottery tickets under the power to regulate commerce. Assuredly not.

Now, a state could prevent the sale of lottery tickets issued by or under the authority of other states, but could it prevent the sale of lottery tickets issued under federal authority if their sale within the respective states had been expressly authorized by Congress? It is submitted that it could not do so any more than it could prevent the sale of federal bonds or stocks, or tax them. This would not be because of the commerce clause, but under other powers of the supreme federal sovereignty. Yet it is submitted that a state could probably prohibit the sale of bonds or stocks of other states, and certainly could freely tax them.

[1] Act of May 4, 1812, c. 75 § 6, 2 Stat. 721, 726; act of May 6, 1812, c. 76, § 1, 2 Stat. 728; act of February 22, 1827, c. 14, 4 Stat., 205.

[2] Laws of 1780, c. 15; General Laws Massachusetts, 1780–1822, p. 42.

The analysis need not be pursued further. These examples must be sufficient to point the argument and to show the force of the contention that the court should not hold this lottery legislation to be within the power of Congress to regulate commerce.

VI.

In considering these ever-interesting and important questions as to the extent and limits of the power of Congress to create and punish crimes, it is always necessary to bear distinctly in mind that the framers of the Federal Constitution saw fit to withhold and deliberately "reserved to the states respectively" many objects which would have been appropriate for federal legislative action. In the light of the practical experience of our own times, we must deplore the fact that unreasonable fear and jealousy of a centralized national government prevailed when the Constitution was adopted, and thwarted the foresight of broader-minded statesmen and philosophers who would have extended and not curtailed the powers of the national government they were about to found. But the general power to punish for crimes in connection with many matters of national interest was denied. The student of the history of that critical period cannot fail to be impressed with the conviction that a grant to the federal government of police powers, such as the regulation and prevention of lotteries, could not have been secured, and that the Constitution itself would not have been ratified if any attempt had been made to give greater scope to federal legislation. All must regret the unfounded fear and the unreasoning jealousy that withheld from the national government powers which to-day could be exercised with immense benefit to the people of

the whole country. It was then, and is now, most desirable that lotteries, divorces, frauds,[1] negotiable instruments, the manufacture of explosives and inflammable oils,[2] etc., should be regulated by the central government under uniform laws. Legislation upon these subjects would tend to simplify the administration of justice, to introduce certainty into our systems of law, to accommodate interstate intercourse, and to strengthen and solidify us as one people. But the power was not conferred; and conservatism has thus far restrained us from amending the fundamental law. Until it is amended, the courts must enforce the Constitution as it is and not as we might wish it had been framed.

If it was not intended in 1789 to confer upon Congress power to regulate lotteries because lotteries were not then commerce any more than other aleatory contracts, then the power does not exist, for the Constitution "neither changes with time, nor does it in theory bend to the force of circumstances."[3] It is today what it was when Hamilton and Madison and Marshall wrote and argued in its support. The surrounding circumstances have changed, modes of life and trade have changed, the manners and morals and thoughts and notions of the functions and end of government and ideals of civic duty and patriotism, all these have changed, but the Constitution remains as it was then. New conditions of society are evolving; systems of municipal law are being changed incessantly to meet novel and complicated conditions; but the fundamental principles of the Constitution are the same as they were when adopted. When new conditions arise, the

[1] *United States* v. *Fox*, 95 U. S. 670.

[2] *United States* v. *Dewitt*, 9 Wall. 41.

[3] See *Ex parte Milligan*, 4 Wall. 2, 120; *In re Debs, Petitioner*, 158 U. S. 564, 591.

inquiry is whether they are analogous in their nature to the conditions which existed at the time of the adoption of the Constitution; and, if so, whether they come reasonably within the scope of the general powers intended to be granted to Congress by the express provisions of the Constitution. We are not at liberty to give the provisions of the Constitution new meanings as applied to conditions such as lotteries which actually existed at the time it was adopted. If we could, then "there is no power which may not, by this mode of construction, be conferred on the general government and denied to the states."[1]

The question now presented must, therefore, be decided, not according to our views of morals or of what would or should be now expedient as a function or power of the federal government, but according to the views of the framers so far as we can gather those views and their intention from the language of the Constitution itself and the circumstances and conditions existing at the time it was framed and adopted.[2] If lotteries which then existed would not have been deemed commerce at that time, the fact that lotteries have now fallen into disrepute cannot turn them into commerce or bring them within the scope of that term.

It may, indeed, be conceded that it is now desirable to have a uniform law regulating or preventing lotteries, as it would be to have a uniform law regulating insurance and divorces and commercial frauds; but, however desirable or however necessary such a federal power may seem to be, if it was not intended to be conferred upon the Congress, it cannot be read into the Constitution by legislative declaration or by judicial legislation.

[1] Chief Justice Taney in the *Passenger Cases*, 7 How. 286, 478; see also *Ex parte William Wells*, 18 How. 307, 311.

[2] *Pollock* v. *Farmers' Loan & Trust Co.*, 157 U. S. 429, 558; *Knowlton* v. *Moore*, 178 U. S. 41, 95.

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As is well known, at the time of the adoption of the Constitution, the ideas of the people in the thirteen states with respect to lotteries were radically different from what they are in our own times. We think lotteries immoral and necessarily detrimental to the welfare of the community. Other nations, particularly the Latin peoples, think otherwise. Our fathers considered lotteries, if honestly conducted, not only not injurious but to be encouraged. Revenue for the support of the state governments, of colleges and churches and other public enterprises was at that time derived from lotteries, and Congress itself sanctioned lotteries. It cannot reasonably be conceived that it was the intention or understanding of the people of the respective states in adopting the Constitution to grant to the federal government the power to prevent the states from using lotteries as a source of state revenue, if they saw fit so to do. It cannot be doubted that if the present question had arisen in the days of Marshall, when the public opinion of the country was not as hostile to lotteries as it is today—an opinion which continued for more than half a century afterwards—and if the federal government had sought to prevent the people of any state from dealing as they saw fit in the lottery issues of other states, it would have been held that Congress had gone outside of the powers which had been conferred on it by the terms of the Constitution, and that the legislation was unconstitutional and void. If this be true, the present legislation is no more valid than it would have been if adopted a century ago. To repeat, the Constitution does not change.

An adjudication that Congress has no constitutional power to prohibit the carriage or transfer of what does not in its nature constitute commerce or relate to it, will in no way affect or limit the power of Congress to carry out effect-

ively the express grant of the function to regulate interstate commerce. If the suggestion be made that Congress would be deprived of the power to prohibit the carriage of diseased animals, of infectious commodities, and of obscene literature and pictures, the answer is that all these constitute primarily a part of legitimate commerce and that, having the power to regulate commerce in them, Congress may prohibit the carriage or transfer of such as will tend to injure the community. Congress was given the power to compel the states to admit articles of commerce, notwithstanding any laws or police regulations of the respective states to the contrary. In all reason, therefore, the power must be implied to say what classes of articles of commerce should or should not be compulsorily brought into a state, and thus to protect the people, for otherwise there could be no protection. Having power to compel, it can safeguard. It is sometimes said that diseased animals or infectious goods or obscene literature do not constitute legitimate articles of commerce, and that their transport may be prohibited on that ground, but this is an incorrect use of terms. If they do not constitute articles of commerce, where did Congress find the power to exclude or regulate them? They are inherently articles of commerce, but they are injurious and harmful articles of commerce, and, as such, Congress may say that it will protect the states against them by prohibiting interstate commerce in them. Whatever may be the definition of lexicographers of the term "regulate," the reasonable and only true interpretation of the Constitution is that when the power to regulate interstate commerce was granted to Congress, it included the power to determine what articles of commerce should or should not have the advantage of free and untrammeled transport or sale, not-

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withstanding the laws of any state. It would, however, be stretching the language to an extreme which, it is submitted, the court will not sanction, if it be urged that under the power to regulate commerce, Congress could prohibit the transfer or compel the free sale of documents which have no relation to commerce and which concern transactions that in their essence do not constitute commerce in any form or sense.

CONCLUSION.

The order should, therefore, be reversed and the court below directed to discharge the appellant.

Washington, February, 1901.

WILLIAM D. GUTHRIE,
Of counsel for appellant.

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No. 106 Q 2

Reply Brf. of Guthrie, M for Appellee

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Supreme Court of the United States.

OCTOBER TERM, 1900.

NO. 106.

CHARLES F. CHAMPION,
Appellant,
vs.
JOHN C. AMES, United States Marshal.

Appeal from the Circuit Court of the United States for the Northern District of Illinois.

BRIEF IN REPLY TO BRIEFS OF APPELLEE.

WILLIAM D. GUTHRIE,
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[17,474.]

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Appeal from the Circuit Court of the United States for the Northern District of Illinois.

BRIEF IN REPLY TO BRIEFS OF APPELLEE.

For the purposes of this case, it is to be assumed, as conceded by the United States on the oral argument, that the lottery tickets and advertisements in question (record, pp. 71–76) were printed in the United States and were not imported from abroad. It follows, therefore, that we are not concerned in the case at bar with any exercise of federal power in respect of imports or smuggled or contraband goods, but with an exercise by Congress of an assumed power (1) to prohibit the transfer from one state to another of any article, and (2) to determine conclusively what is or what is not an article of commerce within the true meaning of the Constitution of the United States.

I.

No decision of this court has held that Congress, under the commerce clause, could prohibit the transfer from one state to another of articles of commerce. Of

course, if the power exist, the wisdom of any particular measure or the motive which induced its passage could not be challenged in the courts. Such a power as is claimed by the Government in the case at bar would draw to Congress a range of legislative action beyond what has ever been seriously conceived to have been intended by those who framed the Constitution of the United States. The limits of the possible ramifications of such a power would, indeed, be difficult to imagine. Its scope would include every form and species of intercourse among the people of the United States, and would practically substitute for the limited power to regulate commerce, the unlimited power to regulate all intercourse, including public morals. So, also, a ruling that Congress may prohibit the transfer of any articles of commerce from state to state would be an expansion of the Constitution broader than anything yet intimated. Moreover, the power to enact absolute prohibition would mean the power of destruction; and surely "this power to regulate is not a power to destroy." [1]

The true rule would seem to be that if an article is in its nature an article of commerce Congress may regulate its transfer from state to state, and may say that after the transfer is completed such article shall or shall not become subject to the state's reserved police power. This is a fair incident of regulation. The Constitution does not say that commerce shall be absolutely free and untrammeled. But if the article in question is not an article of commerce, then the rule must be that Congress cannot under the commerce clause regulate it in any sense, for the simple reason, which must be self-evident, that if the article is not an article of commerce, the power

[1] Chief Justice Waite in the *Railroad Commission cases*, 116 U. S., 307, 331.

to regulate was not delegated, and, consequently, there is no jurisdiction in Congress.

It is, however, said that power must reside somewhere to prevent noxious articles from being introduced into a state. This is conceded. But it clearly resides in the states, and when exercised by the states, according to local policy and necessity, it has been found and is sufficient for all practical purposes.

A state may legislate against the bringing within its borders of any article which the legislature in its discretion considers deleterious, and the states actually do so in respect of many forms of intercourse. The power to exclude from the state noxious articles is absolute except when those articles are articles of commerce. If they are articles of commerce, and Congress has been silent upon the subject, they are presumably entitled to free entry, transportation and opportunity of sale. The police laws of the state cannot reach the article while it remains in its original package as an import and before it has been so separated as to become part of the general property of the state. In other words, while crossing the border, and until the sale in the original package, there must be freedom of sale if Congress has been silent, or if it has so ordained, or if it has not *regulated* in limitation of the right of sale.

But, Congress may, as to any article of commerce, ordain that as soon as it comes within the state, even in its original package, it may be subjected to the operation of the police laws of that state together with other similar property within the borders of the state. It may be suggested that this proposition involves the concession that Congress may thus indirectly prohibit interstate commerce in an article by permitting the states to inter-

fere with and interdict the sale. This conclusion by no means follows. In the first place, Congress, by saying that a certain recognized article of commerce may be subjected to the police laws of the state, does not attempt to prevent the transportation of that article from state to state, and does not attempt in the slightest degree to prohibit interstate commerce in it. There must be a vast difference between an act of Congress which should say that intoxicating liquors may be subjected to the police laws of a state after their transportation into a state, and an act of Congress which should prohibit the transfer of liquor from one state to another;—the one fully recognizes the reserved powers of the state, the other would absolutely interfere with the discretion and power of the states to permit or to prohibit. One state may desire to encourage what another must prohibit; in one locality a certain article, *e. g.* intoxicating liquors, may be deemed beneficial; in another, noxious. A study of the reasoning of the court in the case of *In re Rahrer*, 140 U. S. 545, will convince us that it was by no means the idea that the opinion was sanctioning the contention that Congress might prohibit all interstate traffic in liquors. As Mr. Chief-Justice Fuller said of the legislation then in question (at pp. 561 and 564): "In so doing, Congress has not attempted to delegate the power to regulate commerce, or to exercise any power reserved to the states, or to grant a power not possessed by the states, or to adopt state laws. . . . It imparted no power to the states not then possessed, but allowed imported property to fall at once upon arrival within the local jurisdiction."

As a broad question of statesmanship under a constitution intended to govern an empire—if we may employ

Hamilton's expression in the Federalist—it must be quite evident that the attempt by Congress to regulate by sumptuary laws, for example, the sale of liquor, and to prohibit interstate traffic therein, notwithstanding the wishes of the various states and local preferences, would be a departure which would cause much astonishment, whilst the exercise of the power discussed in *In re Rahrer* by no means involved any power which ought to be considered doubtful, or that any one could reasonably wish did not exist.

II.

In the case at bar, the principal, but not the sole or controlling, proposition of the appellant is that a lottery ticket or advertisement is not an article of commerce and that the protection of the people of the respective states from the evils of the lottery business should be left where it was the intention of the framers of the Constitution to leave it, namely, in the respective states, to permit, to regulate, or to prohibit. If the local laws be enforced, the states have ample power to regulate or prohibit the lottery business. If lottery tickets and advertisements are not articles of commerce, the states clearly have the fullest power to prevent any railroad or express company or other carrier or any person from carrying or transferring such matter within their respective borders.

Congress cannot conclusively determine what is or what is not an article of commerce. That inquiry is essentially a judicial question. Otherwise, Congress could determine for itself the extent and limits of its own powers. A legislative fiat cannot make that commerce or a commercial commodity which in its essence and nature is not such. A transaction which in its nature or analysis

is not commercial, cannot become so merely because Congress declares it commerce. Congress could not, for example, declare insurance to be commerce and compel the states to permit insurance companies to transact business within their borders on the ground that such companies were engaged in interstate commerce. Nor could Congress, under the guise of regulating interstate commerce, compel the states to permit the sale of Louisiana or other lottery tickets, and thus strike down all state laws prohibiting the sale of such tickets. A lottery agent indicted in New York under a statute of that state for selling Louisiana lottery tickets could not invoke the protection of the commerce clause. Would not such a contention be simply preposterous?

The argument of the United States fails to establish any essential difference in principle between an insurance contract or policy and a lottery contract or ticket. If, in three well considered cases,[1] this court has felt constrained to hold that insurance was not commerce and an insurance contract not a commercial transaction *within the true meaning of the Constitution*, then it must logically follow *a fortiori* that lottery tickets, which are but another form of aleatory contracts, and relate in no sense even remotely to commodities, are not commercial transactions. A reference to those cases will show that the analysis contained in the appellee's supplemental brief is not accurate. The court appreciated in *Hooper* v. *California*, 155 U. S. 648, 653, that it would be most desirable and expedient to hold that the interstate insurance business, and particularly marine insurance,

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[1] *Paul* v. *Virginia*, 8 Wall. 168, 183; *Hooper* v. *California*, 155 U. S. 648, 653, 655; *New York Life Insurance Co.* v. *Cravens*, 178 U. S. 389, 401; reviewed again at this term in *Williams* v. *Fears*, 179 U. S. 270, 277.

should be free as part of commerce, but the court could not consistently adopt that view without disregarding the limitations of the Constitution. In that case, on the one side, it was insisted on behalf of Hooper that marine insurance was necessarily a commercial transaction, constituting a part of foreign and interstate commerce, and, on the other side, it was insisted on behalf of the state of California that insurance was not commerce. The briefs on file in the *Hooper* case show this fact conclusively. The question was thus distinctly presented, and the court, as above stated, felt constrained to hold that the commerce clause did not apply, although insurance is obviously an incident of commercial intercourse, as is also an immigrant agency.[1] Significant, too, is it that in the dissenting opinion of Mr. Justice Harlan in the *Hooper* case, there is not the slightest suggestion that insurance did constitute commerce. The dissent was placed on an entirely different ground.

The analogy between the business of insurance and lottery as understood and classed at the time of the adoption of the Constitution is most strikingly confirmed by the extract from Mr. Jefferson's writings submitted in the brief of the Government at p. 77, in which Jefferson is quoted as saying:

> "There are some other games of chance useful on certain occasions and injurious only when carried beyond their useful bounds. Such are insurances, lotteries, raffles, etc. These they do not suppress, but take their regulation under their own discretion. The insurance of ships on voyages is a vocation of chance, yet useful, and the right to exercise it, therefore, is left free. So of houses against fire, doubtful debts, the continuance of a particular life, and similar cases."

The argument that lottery tickets are commodities

[1] *Williams* v. *Fears*, 179 U. S. 270, 273.

because they pass by delivery is not sound, nor does it advance us in the solution of this very broad and important constitutional point. This case must be decided on far broader considerations than this narrow and superficial feature of delivery. Insurance policies on goods in transit usually are not personal, but run in favor of the owner of the property, and the title to that property passes by delivery of the bill of lading or warehouse receipt. The fact that an insurance policy or ticket as it is sometimes called passes by delivery with the delivery of the bill of lading does not render it commerce within the Constitution. Most lottery tickets are now, it is true, payable to bearer and pass by delivery; and because of this fact the Government urges that the decision be placed upon the ground that the ticket may be treated as a commodity. But this contention involves the implication that such transactions would change their essential nature if the mode of doing business were altered and lottery tickets or slips were no longer made transferable by delivery but were confined to the individual first purchasing, with whom a personal contract was made! Such a ground would be entirely too narrow, and, moreover, would be very easily circumvented. It would not reach what of all things is most important, namely, the lottery circulars and advertisements. It would be simple and easy to print within a state the tickets or contracts or slips, or merely record the numbers (as is done on the race track) and then transfer from state to state simply the advertisements and circulars and the notices of drawings (*France* v. *United States*, 164 U. S. 676, 682).

III.

It is, however, contended by the appellee that Congress

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may regulate express companies and other interstate carriers as instrumentalities of commerce, and that this involves the power to determine what they shall and what they shall not transport; in other words, that Congress has exactly the same power over these instrumentalities of commerce that it has over the United States mails. Under this contention, it would follow that Congress could prohibit the transfer from state to state of any class of commodities, of insurance policies, of municipal bonds, of notes, and of everything in fact that is used in interstate intercourse among the people of the respective states. It is submitted that the power to regulate commerce does not authorize Congress to say what shall or shall not be carried from state to state, especially without regard to the commercial character of the matter carried.

Besides, the indictment in the case at bar is not against a carrier; the act is not aimed at carriers; there was no intention to restrain or punish carriers as such; the defendant Champion is not a carrier. When an act of Congress shall be framed expressly applicable to carriers, it will be time enough to consider and determine whether or not Congress can say *quoad* the carrier what he shall or shall not transport and punish him criminally for disobedience. The present case does not present any such question, and at best, if we are to plead to the indictment and the statute, the offense charged is an attempt to cause the express company to do an act for which the express company itself would not be punishable and which act *quoad* the express company is not prohibited by the statute. The statute was drawn so as not to affect or punish the carrier, and perhaps designedly so.

IV.

The Government also suggests that even if lottery tick-

ets and advertisements are not to be treated as commercial commodities and the power to regulate commerce fall short of the power to prohibit and determine what carriers should or should not transport, Congress could, nevertheless, in order to protect what was called "legitimate commerce," regulate, as it were, the morals of all the people of the United States engaged in interstate intercourse and interstate commercial transactions. However desirable such a power might be, it was clearly not delegated to Congress. Exactly the same argument was urged upon this court in the case of *United States* v. *Fox*, 95 U. S. 670, 672, in support of the fraud clause of the bankruptcy legislation of 1867 (Rev. Stat. § 5132, p. 990), but this court said:

> "An act committed within a state, whether for a good or a bad purpose, or whether with an honest or a criminal intent, cannot be made an offence against the United States, unless it have some relation to the execution of a power of Congress, or to some matter within the jurisdiction of the United States. An act not having any such relation is one in respect to which the state can alone legislate."

V.

It also seems to be urged that, even if the legislation in certain aspects be unconstitutional, the court may uphold the act by limiting it to lottery tickets without regard to the provision as to advertisements on the ground that lottery tickets are commercial commodities, or uphold the act by limiting it to express companies or other carriers engaged in interstate commerce on the ground that they are instrumentalities of commerce. It must be patent that Congress did not intend to limit the act or its scope in either of these particulars. Is the court, for the purpose of making a portion of the act valid, to imply limitations which Congress omitted — and presumably with design? Such a form of judicial con-

struction would be nothing less than judicial legislation; it would be making the law and not declaring it; it would be amending the law and not construing it; it would be doing an act not within the province of the judiciary. Besides, the precedents are entirely against any such form of construction.

In *United States* v. *Reese et al.*, 92 U. S. 214, 221, an act of Congress, passed May 31, 1870 (16 Stat., 140), provided for the punishment of election officers who should refuse to any person lawfully entitled to do so the right to cast his vote at an election. The court was of opinion that Congress had constitutional power to punish such denial only when it was on account of race, color or previous condition of servitude. It was urged that the general description of the offense included the more limited one, and that the section was valid where such was, in fact, the cause of denial. But the court said through Mr. Chief Justice Waite:

> "We are not able to reject a part which is unconstitutional, and retain the remainder, because it is not possible to separate that which is unconstitutional, if there be any such, from that which is not. The proposed effect is not to be attained by striking out or disregarding words that are in the section, but by inserting those that are not now there. Each of the sections must stand as a whole, or fall altogether. The language is plain. There is no room for construction, unless it be as to the effect of the Constitution. The question, then, to be determined, is, whether we can introduce words of limitation into a penal statute so as to make it specific, when, as expressed, it is general only. . . . *To limit this statute in the manner now asked for would be to make a new law, not to enforce an old one. This is no part of our duty.*"

In the *Trade-Mark Cases*, 100 U. S. 82, 98, 99, an act of Congress provided for the registration of trade-marks generally without limiting their use to commerce

between the states or with foreign countries. The defendants were indicted for violating the provisions of this act. It was suggested that if Congress had power to regulate trade-marks used in commerce with foreign nations and among the several states, the statute should be held valid in that class of cases, if no further. The court (Miller, J.) said:

> "While it may be true that when one part of a statute is valid and constitutional, and another part is unconstitutional and void, the court may enforce the valid part where they are distinctly separable so that each can stand alone, it is not within the judicial province to give to the words used by Congress a narrower meaning than they are manifestly intended to bear in order that crimes may be punished which are not described in language that brings them within the constitutional power of that body" (p. 98). . . . "*If we should, in the case before us, undertake to make by judicial construction a law which Congress did not make, it is quite probable we should do what, if the matter were now before that body, it would be unwilling to do; namely, make a trade-mark law which is only partial in its operation,* and which would complicate the rights which parties would hold, in some instances under the act of Congress, and in others under state law." (p. 99).

The act was, therefore, held to be wholly unconstitutional.

In *Poindexter* v. *Greenhow*, 114 U. S. 270, 304, certain bonds of the state of Virginia had been issued under an act providing that the coupons thereon should be receivable at and after maturity for all taxes due the state. Thereafter the legislature passed an act requiring tax collectors to receive in discharge of taxes gold, silver, treasury notes, national bank currency and nothing else, and forbidding the receipt of coupons issued under the foregoing act in payment therefor.

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The latter act also abolished the actions of trespass and trespass on the case, and other particular forms of action as remedies for the taxpayer who had tendered his coupons in payment of taxes. The court held that the provisions of the act providing that the coupons should be receivable in payment of taxes constituted a contract, and that the act providing that they should not be so receivable was unconstitutional as it impaired the obligation of that contract. It held also that those parts of the latter act abolishing the remedies of the taxpayer were not separable from the remainder of the act, inasmuch as they all constituted part of one plan, and that the entire act was, therefore, unconstitutional. Matthews, J., said:

> "It is undoubtedly true that there may be cases where one part of a statute may be enforced as constitutional, and another be declared inoperative and void, because unconstitutional; but these are cases where the parts are so distinctly separable that each can stand alone, and where the court is able to see, and to declare, that the intention of the legislature was that the part pronounced valid should be enforceable, even though the other part should fail. *To hold otherwise would be to substitute for the law intended by the legislature one they may never have been willing by itself to enact.*"

In *Spraigue* v. *Thompson*, 118 U. S. 90, 95, a statute of Georgia provided that any master of a vessel bearing toward any of the ports of the state, except coasters in the state, and between the ports of the state and those of South Carolina or of Florida, who refused to receive a pilot on board, should be liable, on his arrival in such port of the state, to pay the first pilot who might have offered his services outside the bar the full rates of pilotage established by law. It was held that this provision was unlawful by reason of the fact that it discriminated in rates between the ports of different states.

It was urged that the illegal exceptions might be disregarded so that the rest of the section could stand, upon the principle that a separable part which is unconstitutional, may be rejected, and the remainder of the statute preserved and enforced. The court said (Matthews, J.):

> "The insuperable difficulty with the application of that principle of construction to the present instance is, that by rejecting the exceptions intended by the legislature of Georgia the statute is made to enact what confessedly the legislature never meant. *It confers upon the statute a positive operation beyond the legislative intent, and beyond what any one can say it would have enacted in view of the illegality of the exceptions.*"

In *Baldwin* v. *Franks*, 120 U. S. 678, 685, an act of Congress provided for the punishment of those who in any state or territory conspired for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws or of equal privileges or immunities under the laws. It had previously been held that this statute was unconstitutional in so far as it applied to conspiracies to deprive persons of the equal protection of the laws of the state, no special rights or privileges arising under the constitution, laws or treaties of the United States being involved. It was contended that, while this was the fact, still the statute was effectual so far as concerned conspiracies to deprive aliens of the rights guaranteed to them in a state by the treaties of the United States. The court said (Waite, C. J.):

> "In support of this argument reliance is had on the well-settled rule that a statute may be in part constitutional and in part unconstitutional, and that under some circumstances the part which is constitutional will be enforced, and only that which is unconstitutional rejected. To give effect to this rule, however, the parts—that which is constitutional and that which is unconstitutional—must be capable of

separation, so that each may be read by itself. This statute, considered as a statute punishing conspiracies in a state, is not of that character, for in that connection it has no parts within the meaning of the rule. . . . It provides in general terms for the punishment of all who conspire for the purpose of depriving any person, or any class of persons, of the equal protection of the laws, or of equal privileges or immunities under the laws. A single provision, which makes up the whole section, embraces those who conspire against citizens as well as those who conspire against aliens—those who conspire to deprive one of his rights under the laws of a state, and those who conspire to deprive him of his rights under the Constitution, laws, or treaties of the United States. The limitation which is sought must be made, if at all, by construction, not by separation. This, it has often been decided, is not enough."

The subject was again reviewed by Mr. Chief Justice Fuller in *Pollock* v. *Farmers Loan & Trust Co.*, 158 U. S. 601, 635, 636, where the above cases of *Poindexter* v. *Greenhow* and *Spraigue* v. *Thompson* were particularly cited with approval.

CONCLUSION.

For these reasons and those suggested in the briefs already filed, it is submitted that this interstate commerce feature or portion of the act of Congress of March 2, 1895,[1] should be declared to be an exercise of power not delegated to Congress by the Constitution and consequently invalid, and that the regulation of public morals in respect of lotteries must be held to remain, as it has ever been, within the local jurisdiction of the respective states.

Washington, March 5, 1901.

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[1]The several features of the act were passed at different times. Thus, the feature as to the United States mails was enacted in 1890 (26 Stat. 465); the feature as to imports from abroad, in 1894 (28 Stat. 549), and the feature as to transfers from state to state, in 1895 (28 Stat. 963).